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No. 00-632

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF MICHIGAN, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT SOUTH CAROLINA PUBLIC SERVICE AUTHORITY IN SUPPORT OF PETITIONERS

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY
JOHN WEST
Executive Vice President and Chief Legal Officer
ELIZABETH H. WARNER
Associate General Counsel
CATHERINE P. BLACK
Senior Attorney
P.O. Box 2946101
Moncks Corner, SC 29461
(843) 761-8000

HOWARD E. SHAPIRO
Counsel of Record
STEPHEN C. FOTIS
VAN NESS FELDMAN,
A Professional Corporation
1050 Thomas Jefferson Street, N.W.
7th Floor
Washington, D.C. 20007-3877
(202) 298-1800
Attorneys for South Carolina Public Service Authority

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QUESTION PRESENTED

Whether, under § 110 of the Clean Air Act, 42 U.S.C. § 7410, the cost of reducing air pollutant emissions is a relevant and proper factor for the United States Environmental Protection Agency ("EPA") to use in determining whether a state is significantly contributing to another state's failure to attain a national ambient air quality standard.

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STATEMENT

South Carolina Public Service Authority d/b/a/ Santee Cooper adopts the Statement set forth in the Petition of the State of Michigan *et al.* (Mich. Pet. 3-7). Santee Cooper is a state-owned electric and water utility, and the nation's fourth largest public power system. It operates a number of large electric generating facilities, including coal-fired units directly affected by the NO_X SIP Call. Santee Cooper was a petitioner in the court of appeals. It joined the consolidated brief of parties in the court of appeals who unsuccess-

fully challenged EPA's use of cost factors under § 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994).[1]

ARGUMENT

Santee Cooper urges the Court to grant the *writ of certiorari* sought in this case[2] by Michigan and four other States. One of the petitioners is Santee Cooper's home state, South Carolina. Santee Cooper fully supports South Carolina and the other States petitioning in this docket.

The court of appeals has seriously misconstrued § 110(a)(2)(D)(i)(I) of the Clean Air Act ("CAA"), 42 U.S.C. § 7410(a)(2)(D)(i)(I), by allowing the Environmental Protection Agency ("EPA") to use the cost of reducing air pollutant emissions to determine whether a state is "contributing significantly" to nonattainment of the National Ambient Air Quality Standards (NAAQS) in another state. The language in § 110(a)(2)(D)(i)(I) speaks directly to "significant contribution." That language permits only a quantitative air quality approach, not a cost approach, when EPA determines whether upwind states "contribute significantly" to nonattainment in downwind states. Because §110(a)(2)(D)(I)(i) is clear and unambiguous, even if the Court were to hold in *American Trucking Associations. v. U.S. EPA*, No. 99-1426 (argued November 7, 2000), that costs may be considered by EPA when setting NAAQS under § 109(b) of the CAA, 42 U.S.C. § 7409(b), that holding would not apply to the plainly different language of § 110(a)(2)(D)(i)(I). Since the District of

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[1] Joint Common Issues Brief of Industry Labor Petitioners, D.C. Cir. No. 98-1497 (and consolidated cases).

[2] If the Court grants the petition in this case, it should also grant the two other petitions seeking review of the Court of Appeals' ruling on the "significant contribution" issue: *The States of Ohio and Indiana v. U.S. Environmental Protection Agency, et al.*, No. 00-633 and *Appalachian Power Co., et al. v. U.S. Environmental Protection Agency*, 00-445

Columbia Circuit is the premier appellate forum for resolution of issues under the CAA (42 U.S.C. 7607(d)(1)), and since the court of appeals' determination in this case affects strongly conflicting interests among states across the entire Eastern half of the nation, there are compelling reasons for the Court to grant the writ.

1. The D.C. Circuit's construction of § 110(a)(2)(D)(i)(I) permits the Environmental Protection Agency ("EPA") to make a "significant contribution" determination that is not based on air quality factors. The statute, however, expressly confines "significant contribution" to the emission of "any air pollutant *in amounts which will contribute significantly* to nonattainment in, or interfere with maintenance by, any other State" (emphasis added). Under the court of appeals' reading, the ultimate determination of contribution to nonattainment may be made by EPA on the basis of what the court described as essentially unbounded discretion to decide the appropriate costs for controlling the interstate transport of pollutants. (Mich. Pet. App. 23a).

The D.C. Circuit's endorsement of EPA's construction is inconsistent with the description, elsewhere in its opinion, of the requirements of the statute. The majority expressly ruled that under § 110(a)(2)(D)(i), "EPA must find (1) emissions activities within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment." (Mich. Pet. App. 24a). Under the majority's reading, however, the third factor—which is the crux of § 110(a)(2)(D)(i)(I)—depends on the *costs* of controlling emissions as determined by EPA, rather than on air quality, *i.e.*, the quantitative "amount" of any air pollutant that reaches downwind states. In effect, the statute's quantitative air quality requirement is reduced to a mere preliminary "nominal" determination. The real determination of significance turns on EPA's view of the costs of control. The majority concedes as much. It said:

> EPA's design was to have a lot of states make what it considered modest NO_X reductions, uniformly limited to one that could be achieved (in *EPA's* estimate) *for less than $2,000 a ton.* (Mich. Pet. at 15a) (emphasis added).

The court also conceded that EPA's approach produces variations among states as to the threshold for "contribut[ing] significantly." It observed:

> As a result, naturally, the ultimate line of "significance," whether measured in volume of NO_X emitted or arriving in nonattainment areas, would vary from state to state depending on variations in cutback costs. (Mich. Pet. at 15a).

Further, the court acknowledged that EPA's use of costs, rather than "amounts of pollutants," as the measure of "significant contribution" forces states to order reductions of emissions on the basis of EPA's cost test, not the actual NO_X amounts contributing significantly to downwind nonattainment. It ruled:

> Petitioners claim that . . . where two states differ considerably in the amount of their respective NO_X contributions to downwind nonattainment, under the EPA rule even the small contributors must make reductions equivalent to those achievable by highly-effective measures. This of course flows ineluctably from the EPA's decision to draw the "significant contribution" line on a basis of cost differentials. (Mich. Pet. at 22a).

Treating upwind states that contribute only small amounts of pollutants to downwind nonattainment the same as states that contribute large amounts is flatly inconsistent with the exclusive focus of § 110(a)(2)(D)(I)(i) on air quality factors, through the quantitative term "amounts." Such a construction irrationally permits the large contributors to continue contributing significant amounts to downwind nonattainment to the extent that the costs of reducing such pollution exceed

$2,000. The court's decision to uphold EPA's construction converts the statute's provision for quantity-based variations among upwind states into a one-size-fits-all formula. This revision of Congress' intent can be explained only by the majority's eagerness to advance the proposition that costs should be considered under any regulatory statute unless there is a clear legislative expression to the contrary.

As the petitioning States demonstrate, the plain language in § 110(a)(2)(D)(i)(I) *is* such a clear expression to the contrary. Section 110(a)(2)(D)(i) literally requires that states include in their State Implementation Plans ("SIPs") restrictions on the quantity of pollutants adversely affecting other states. SIPs must prohibit emissions of "any air pollutant in amounts which will contribute significantly to nonattainment," in other states. This plain language should have disposed of the entire case, for the reasons set forth in Judge Santelle's dissent. And, as he also showed, Congress left no room for deference to EPA's construction under *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984). (Mich. Pet. 51a-53a).

By allowing EPA to consider cost factors in its § 110(a)(2)(D)(i) determination, the court of appeals effectively authorizes an extraneous, nonstatutory factor in the agency's "significant contribution" equation. It imposes an irrational uniformity on states regardless of their level of interstate emissions. The decision allows EPA to usurp state authority by shifting to itself initial authority to determine control strategies for achieving compliance with NAAQS.

Such a shift is contrary to the fundamental scheme of the CAA. That scheme vests in the states primary responsibility for implementing National Ambient Air Quality Standards ("NAAQS") developed by EPA under § 109, 42 U.S.C. 7409. They must apply the federal NAAQS to emission sources within their borders. Section 110(a)(2) calls on the states to include in their SIPs "adequate provisions" prohibiting sources within the state from emitting pollutants in amounts

that will contribute significantly to nonattainment or interfere with maintenance of NAAQS in other states. In implementing the NAAQS, the states must, in effect, undertake a triage that allocates the costs and burdens of compliance among the various categories of emission sources they requlate. EPA's reading of § 110(a)(2)(D)(i) as sustained by the court, however, arrogates to the federal government a fundamental element of pollution control strategy—costs—that Congress intended the states to determine and allocate.

The error of the court of appeals' construction of § 110(a)(2)(D)(i)(I) extends beyond interstate transport prevention under that provision. EPA could, with the D.C. Circuit's blessing, apply its version of "highly effective cost controls" to set aside *any* state's determination of the extent that particular in-state sources, or categories of in-state sources, must reduce emissions in order to attain or maintain NAAQS.

2. Whatever the outcome of the cross-petition in *American Trucking*, the D.C. Circuit's misconstruction of § 110(a)(2)(D)(i) is an issue of compelling public importance that independently warrants review by this Court. It involves the core of the CAA's scheme of cooperative federalism. It also involves the crucial question of when costs may be considered by EPA when it implements the various, and differing, provisions of the CAA.

The D.C. Circuit resolves these issues by allowing EPA to use a cost test even where Congress clearly indicates the contrary. Yet EPA takes a different, and inconsistent, approach to § 109 in its merits brief before this Court in the *American Trucking* cross-petition. EPA there argues that costs can be considered "in the NAAQS-implementation process, but not in the NAAQS-setting process." (Br. for Fed. Resp., No. 99-1426 at 16). EPA fails to recognize, however, that the factors within the general category of "implementation" depend on the language of each specific provision within that category.

Some implementation provisions include only air quality factors, while other include cost, technological feasibility, or other considerations as well. Thus, EPA errs in *American Trucking* when it describes the court of appeals' decision in this case as an example of an "appropriate" consideration of costs in the implementation process. Such a use of costs is appropriate, it contends, because "Congress has not expressly prescribed what factors [EPA] should consider in making regulatory determinations." (*Id.* at 41). Nevertheless in the same brief EPA insists that "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." (Br. for Fed. Resp. at 43, *citing American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 510 (1981)).

The *American Textile* principle applies to the CAA. Where Congress intends costs to be considered at a particular stage of "implementation" or other processes under the CAA, it has so specified. *See e.g.*, § 109(d)(2) (advice of adverse economic effects to be included in CASAC reports); § 112(d) 42 U.S.C. § 7412 (d) (emission standards for hazardous pollutants shall take into consideration the cost of achieving emission reductions). There is no basis for applying a different principle to § 110(a)(2)(D)(i)(I).[3]

3. Michigan, South Carolina and the other States have shown in their petition that the consequences of the court of appeals decision are of enormous public importance to upwind and downwind states. Those consequences are also of enormous economic significance to sources of emissions like Santee Cooper, which must bear the actual costs of compliance. This Court should clarify the standard for deciding

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[3] Because § 110(a)(2)(D)(2)(i)(I) clearly excludes costs, costs cannot be even a "secondary factor" for determining significant contribution, contrary to the contention in the petition of States of Ohio and Indiana in their petition in No. 00-633.

when costs may be considered under the CAA in general, and under §110(a)(2)(D)(i) in particular; and the extent to which the *American Textile* principle applies to the varied provisions of this exceedingly complex statute.

CONCLUSION

For the reasons stated in the Petition of the State of Michigan et al., and in this response, the petition for a writ of certiorari should be granted regardless of the outcome of the cross-petition granted in No. 99-1426.

Respectfully submitted,

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY
JOHN WEST
Executive Vice President and Chief Legal Officer
ELIZABETH H. WARNER
Associate General Counsel
CATHERINE P. BLACK
Senior Attorney
P.O. Box 2946101
Moncks Corner, SC 29461
(843) 761-8000

HOWARD E. SHAPIRO
Counsel of Record
STEPHEN C. FOTIS
VAN NESS FELDMAN,
A Professional Corporation
1050 Thomas Jefferson Street, N.W.
7th Floor
Washington, D.C. 20007-3877
(202) 298-1800

Attorneys for South Carolina Public Service Authority